United States

October Term, 1949

Nos. 171 and 188

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No. 171

No. 188

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

Nos. 171 and 188

THE UNITED STATES OF AMERICA, *Appellant*, vs. JOE BURNISON and PHIL C. KATZ, Public Administrator of the City and County of San Francisco, *Appellees.*	No. 171
THE UNITED STATES OF AMERICA, *Appellant*, vs. CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, et al., *Appellees.*	No. 188

On Appeals from the Supreme Court of the State of California.

BRIEF FOR JOE BURNISON, APPELLEE.

INTRODUCTION.

In this proceeding the United States of America, Appellant, filed a petition for the allowance of an appeal by this Honorable Court pursuant to 28 U.S.C. 1257(2) which reads as follows:

> "1257—State Courts—Appeal—Certiorari.—Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> (2) By appeal, where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Said petition is for the allowance of an appeal from a judgment of the Supreme Court of the State of California construing Section 27 of the Probate Code of the State of California, which provides as follows:

> "Who may take by will. A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The said judgment of the Supreme Court of the State of California rules that the United States of America does not come within the purview of said Section 27 of said Probate Code, and that the will of deceased, one Gust Burnison, leaving all of his estate to "The United States Government, U.S.A.", is void.

The decisions of this Honorable Court and those of the highest Courts in the various States uniformly sustain the decision of the Supreme Court of the State of California.

This Honorable Court noted *probable jurisdiction* of this appeal on October 10, 1949.

Appellee Joe Burnison contends as follows:

1. This Honorable Court does not have jurisdiction of this appeal because the matter of the devolution of property by will being exclusively under the control of the Legislatures of the several states, no question as to the constitutionality of said Section 27 of said Probate Code as regards the Constitution of the United States, can be or is involved, and appellant's petition should be dismissed;

2. The judgment of the Honorable Supreme Court of the State of California construing the said Section 27 of the Probate Code of the State of California is not subject to review by this Honorable Court, even though the effect of such construction is to remove any repugnancy to the Constitution of the United States.

THE FACTS.

The facts are as stated in the introductory paragraph of the opinion of the Supreme Court of the State of California (Transcript of Record, p. 54):

> "This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and thirteen nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to 'The United States government U.S.A.' Appellant maintains that the 'United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident' thereof, that the testamentary 'bequest' is therefore 'void', and that all of the estate should be distributed to the 'heirs at law of deceased under and pursuant to the laws of succession of' this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved."

QUESTION PRESENTED BY PETITION FOR APPEAL.

The only question presented by the said petition for appeal is as to the constitutionality of Section 27 of the Probate Code of the State of California, which designates those who may take under a will executed in the State of California.

In other words, the question *is not* as to whether the United States may accept gifts and bequests—

The question is as to the power of the State of California to designate those who may take by a will executed in the State of California.

ARGUMENT.

POINT I.

THE POWER TO DESIGNATE THOSE WHO MAY TAKE BY WILL RESTS WITH THE LEGISLATURES OF THE SEVERAL STATES, AND THE SUPREME COURT OF THE UNITED STATES DOES NOT HAVE JURISDICTION TO ENTERTAIN THIS APPEAL.

Appellee Joe Burnison contends that the power to designate those who may take by a will executed in the State of California by a resident of the State of California rests with the Legislature of the State of California; that in enacting the said Section 27 of the Probate Code, the Legislature of the State of California exercised its proper power, and definitely and purposely excluded the United States from the purview of said code section; that no federal question is involved in this appeal and this Honorable Court does not have jurisdiction to entertain this appeal, and this appeal should be dismissed.

Under the American system of government the sovereignty, in so far as it can be exercised by governmental means, is divided between the federal and the state authorities, each being sovereign in its own sphere (16 *Corpus Juris Secundum*, p. 124).

Amendment X of the Constitution of the United States reads:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Authorities are legion to the effect that the Constitution of the United States is a grant of powers, and that the federal government can exercise no powers except those specifically enumerated in the Constitution of the United States and such implied powers as are necessary and proper to carry into effect the enumerated powers.

We quote the following pertinent language from the opinion of the Supreme Court of the United States in the case of *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 315, 316 (year 1936):

"It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

"The two classes of powers are different, both in respect of their origin and their nature. *The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative*

powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. Carter v. Carter Coal Co., 298 U.S. 238, 294." (Emphasis ours.)

Since the year 1850 it has been the rule established by the Supreme Court of the United States that the devolution of property by will is a matter to be regulated exclusively by the Legislatures of the several states as regards real and personal property within their dominions, and that there is nothing in the Constitution of the United States to prevent the several states from designating who may or may not take by a will executed in the particular state jurisdiction with reference to property situated within said jurisdiction, and further that the right to take property by devise or bequest under a will is not an inherent right of citizenship, but is a creature of statute, to be granted or denied by the Legislature of the particular State involved.

In *Mager v. Grima,* 49 U.S. 489, 492 (8 Howard) (year 1850), the Honorable Supreme Court of the United States states as follows:

"Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." (Emphasis ours.)

And we quote from the following cases decided by the Supreme Court of the United States:

United States v. Fox, 94 U.S. 315 at 321 (year 1876):

> "Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Hen. VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her Constitution, in 1777; and, with some modifications in its language, remains so at this day. *Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all.* His power is bounded by its conditions. That 'statute provides that a devise of lands may be made 'to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise.'
>
> *The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government.* It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as created under the laws of the State. It was so held by the Court of Appeals in White v. Howard, 46 N.Y. 164, 165,

and its construction of the statute is conclusive upon us." (Emphasis ours.)

Maxwell v. Bugbee, 250 U. S. 525 at 536 (year 1919):

> *"The right to inherit property, or to receive it under testamentary disposition, has been so frequently held to be the creation of statutory law, that it is quite unnecessary to cite the decisions which have maintained the principle."* (Emphasis ours.)

Lyeth v. Hoey, 305 U.S. 188 at 193 (year 1938):

> *"Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction.* Mager v. Grima, 8 How. 490, 493; Maxwell v. Bugbee, 250 U. S. 525, 536, 537. *The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction.* Uterhart v. United States, 240 U.S. 598, 603." (Emphasis ours.)

Irving Trust Co. v. Day, 314 U.S. 556, 62 S. Ct. 398, 86 L.Ed. 452, 137 A.L.R. 1093, 1098 (year 1942):

> "Rights of succession to the property of deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. *Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction.* Mager v. Grima, 8 How. (U.S). 490, 12 L. Ed. 1168; United States v. Fox, 94

U.S. 315, 24 L. Ed. 192; United States v. Perkins, 163 U.S. 625, 41 L. Ed. 287, 16 S. Ct. 1073; cf. Randall v. Kreiger, 23 Wall. (U.S.) 137, 148, 23 L.Ed. 124, 126." (Emphasis ours.)

Clark v. Allen, 331 U.S. 503 at 517 (year 1947):

"*Rights of succession to property are determined by local law. See Lyeth v. Hoey,* 305 U. S. 188, 193; Irving Trust Co. v. Day, 314 U.S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. Hauenstein v. Lynham, supra. Then the state policy must give way. Cf. Hines v. Davidowitz, 312 U.S. 52. *But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country,* United States v. Curtiss-Wright Corp., 299 U.S. 304, 316-17, *or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution.* What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." (Emphasis ours.)

The case last cited is heavily relied upon by appellant in its statement of jurisdiction, page 10, but the quotation there set forth is not complete. The complete statement quoted above sustains appellee's position that no constitutional question is involved in this proceeding and that this Honorable Court has no jurisdiction in the matter.

The Supreme Courts of the several states consistently have followed the rule established by the decisions of the Supreme Court of the United States; and the decisions of other states subscribing to the principles enunciated therein, and we quote as follows:

Taylor v. Payne (Fla.), 17 So. (2d) 615, 154 A.L.R. 677, 679:

> "The right to receive or dispose of property by last will and testament is not an inherent right, nor is it one that is guaranteed by the fundamental law. *Nowhere in the Federal Constitution is there any attempt to treat of the matter of disposition of property by will, no reference being made to the subject of testamentary alienation of property, either directly or by implication.* And except as the power to will property has been limited indirectly to Article X of the Constitution of Florida, which inhibits the alienation of homestead property by will where the owner thereof has children in esse, no effort at constitutional regulation of the subject has been made by the people of the State of Florida. *Therefore, the right of testamentary disposition of property does not emanate from the organic law, as contended by counsel, but is a creature of the law derived solely from statute without constitutional limitation.* Accordingly, the right is at all times subject to the regulation and control by the legislative authority which creates it. *The authority which confers the right may impose conditions thereon, such as limiting disposition to a particular class* or fixing the time which must

ensue subsequent to the execution of the will before gifts to a particular class shall be deemed valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary, without private or constitutional rights of the citizen being thereby violated. Thomas v. Williamson, 51 Fla. 332, 40 So. 831, 834; Patton v. Patton, 39 Ohio St. 590, 596; In re Noyes' Estate, 40 Mont. 178, 105 P. 1013; In re Beck's Estate, 44 Mont. 561, 121 P. 784, 1057; In re Walker's Estate, 110 Cal. 387, 42 P. 815, 1082, 30 L.R.A. 460, 52 Am. St. Rep. 104; Redfearn on Wills and Administration of Estates in Florida, pp. 42 et seq." (Emphasis ours.)

Hazard v. Bliss, 43 R.I. 43, 113 Atl. 469, 23 A.L.R. 826, 837:

"* * * the right to take property by descent or devise is not a natural one, but is a privilege granted by the state upon such condition as it may impose and subject in all respects to its regulation. Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 42 L.Ed. 1037, 18 Sup. Ct. Rep. 594."

McDermid v. Bourhill, 101 Ore. 503, 199 Pac. 610, 22 A.L.R. 428, at 432:

"*It has been definitely settled that the right to take property by devise or descent is the creature of law, and not a natural right.* Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594; United States v. Perkins, 163 U.S. 625, 41 L. Ed. 287, 16 Sup. Ct. Rep. 1073; Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127; Knowlton v. Moore, 178 U.S.

41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747, and extensive list of cases collected in note found in 9 Ann. Cas. 711. It has been stated: 'In most jurisdictions in the United States, it is apprehended, the capacity to make a will, whether of real estate or personalty depends entirely on statute. The legislature has plenary power to withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases.' 40 Cyc. 997." (Emphasis ours.)

Beck's Estate, 54 Mont. 561, 121 Pac. 784, at 786:

"The right to make testamentary disposition of property depends entirely upon the will of the Legislature. It may withhold the right altogether, or impose any limitations or conditions upon it which it chooses. In re Noyes' Estate, 40 Mont. 178, 105 Pac. 1013. *A necessary postulate of this proposition is that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty.*" (Emphasis ours.)

The decisions of this Honorable Court and of the highest Courts in the several States are clearly in accord on the point that the right to take under the will of a deceased person is controlled by the Legislatures of the several States, and may be granted or withheld at the pleasure of said Legislatures.

In view of the authorities above cited it may not be said that a substantial, or any, Federal question is involved in this appeal.

The Federal question is plainly unsubstantial where its unsoundness so clearly results from the previous decisions of the Supreme Court of the United States as to foreclose the subject. (54 *American Jurisprudence,* pp. 825-826.)

This is almost the exact language used by this Honorable Court in its opinion in the case of *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255, 58 S. Ct. 865, 82 L. ed. 1323, where it is said:

> "The lack of substantiality in a federal question may appear either because it is obviously without merit or *because its unsoundness so clearly results from the previous decisions of this Court* as to foreclose the subject. *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103, 105, 106." (Emphasis ours.)

Furthermore, this Honorable Court in its opinion in the case of *Consolidated Turnpike Co. v. Norfolk Etc., Railway,* 228 U.S. 596, 599, 33 S. Ct. 605, 57 L. ed. 982, stated that, assuming that a Federal question was involved:

> "* * * if also it appears that the judgment of the state court against the plaintiff in error *was based upon a question of general law broad enough to support the decision, this court will not consider the Federal question,* though it was considered and determined by the court adversely to the plaintiff in error." (Emphasis ours.)

See to like effect

Gaar Scott & Co. v. Shannon, 223 U.S. 468, 470.

Appellee Joe Burnison respectfully submits that the decision of the Honorable Supreme Court of the State of California in this matter (Transcript of Record, p. 54) *is based upon a question of general law broad enough to support said decision.*

The question of general law involved in the present case is: *Do the Legislatures of the several States of the United States have the power to control the devolution of property by wills executed in the respective States by residents thereof?*

Certainly this is a question of general law broad enough to support the decision of the Supreme Court of the State of California. (Transcript of Record, p. 54.)

The question as to the power of the several States to control the devolution of property by wills executed within their several jurisdictions has been decided in numerous cases, and favorably to the power of the several States, by this Honorable Court and by the highest Courts of the several States. (See authorities cited above.)

Section 27 of the Probate Code of California, the constitutionality of which is in question in this proceeding, after specifically designating those who may take under a will executed in the State of California, including corporations, concludes as follows:

> *"No other corporation can take under a will unless expressly authorized by statute."* (Emphasis ours.)

The United States of America is not named as one who may take under a will executed in the State of California.

Appellee Joe Burnison contends that had it been the intention of the Legislature of the State of California to include the United States Government in said section, the United States Government would have been named as the first taker under the rule stated in *Davis v. Pringle,* 268 U.S. 315 at 318, as follows:

> *"The ordinary dignities of speech would have led to the mention of the United States at the beginning of the clause if within its purview."*

Appellant, the United States of America, freely concedes that there is no general Act of Congress or Federal statute authorizing the United States to take under the will of a deceased person.

In its brief, page 24, appellant states:

> *"Congress has never felt that a general statute authorizing the acceptance of testamentary gifts was necessary."* (Emphasis ours.)

And in this connection, we refer to the opinion of the Honorable Supreme Court of the State of California in the present proceeding which reads as follows (Transcript of Record, pp. 58-59):

> "The Government's contention that if Section 27 of the Probate Code should be construed as invalidating the bequest in question, 'serious constitutional questions would arise' involving an 'unlawful discrimination against the United

States' it is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, supra, and the claim that assuming 'the Fox case cannot be distinguished, it must be regarded as overruled' are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a 'corporation . . . expressly authorized by statute' aid the Government in its attempt to uphold the validity of the bequest in question. Whether or not the word 'corporation' is such 'legislative environment' would include the United States as a 'governmental body' (see State of Ohio v. Helvering, 292 U.S. 360, 370; State of Georgia v. Evans, 316 U.S. 160, 161), *the further requirement of the section is concededly unsatisfied in the Government's admission that though 'various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses . . . no Federal statute of general application has purported to authorize the United States to so acquire property.'* It is true that the capacity of the United States to 'receive a voluntary devise or bequest' has been regarded as an 'inherent attribute of sovereignty' and so sustained as an implied power of the federal government, but such principle has no force where there is an 'express statute' of the state wherein 'the testator had his domicil' effecting 'a restriction as to who may be devisees or legatees.' (Dickson v. United States, 125 Mass.

311, 315.) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take 'under a will.' (United States v. Fox, supra, 94 U.S. 315; United States v. Perkins, supra, 163 U.S. 625; Irving Trust Co. v. Day, supra, 314 U.S. 556.)" (Emphasis ours.)

In a number of places in its brief (pages 9, 10, 11, 12, 13, 27, 28, 29, 30, 38), the appellant, the United States of America, refers to *"the supremacy clause of the Constitution"* specifically referring to Article VI of the Constitution of the United States which provides in part as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

However, appellant does not mention in this connection Amendment X of the Constitution of the United States which provides:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The obvious purpose of the people of the United States in adopting Amendment X to the Constitution was to clarify Article VI, and to eliminate any contention that the Constitution of the United States is anything other than a grant of powers, and such implied powers as are necessary and proper to carry into effect the enumerated powers, and that all powers not so granted are reserved to the several States and the people.

In *United States v. Sprague,* 282 U.S. 716, 733, 51 S. Ct. 220, 75 L. Ed. 640, in the course of its opinion this Honorable Court states:

> "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people."

And in *United States v. Darby,* 312 U.S. 100, 123, 61 S. Ct. 451, 85 L. ed. 609, the opinion reads in part as follows:

> "Our conclusion is unaffected by the Tenth Amendment which provides: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The amendment states but a truism that all is retained which has not been surrendered. *There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state government as it had been established by the Constitution before the amendment, or that its purpose was*

other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." (Emphasis ours.)

This being the interpretation placed upon Article VI and Amendment X of the Constitution, we are unable to understand the contention of appellant that Article VI is a "supremacy clause" which ignores the power of the several states to control their internal affairs, except where such power has been expressly delegated to the Federal Government.

There is nothing in the United States Constitution or in any Federal statute which governs the devolution of property by will. The several States always have had and still have the power, by statute, to designate the persons who may take by will.

Relying upon the provisions of Article VI of the Constitution, and *ignoring* Amendment X, appellant has cited a number of cases purporting to sustain its contentions on this appeal.

Appellant in its brief, page 9, says:

"It is 'under our Constitution (that) the devolution of property is determined by the laws of the several States'. Snyder v. Bettman, 190 U.S. 249, 252. Thus a *treaty* permitting foreign nationals to take testamentary gifts overrides, *under the supremacy clause of the Constitution,* the inconsistent provisions of state law. Clark v. Allen, 331 U.S. 503. Similarly, for example, it cannot be doubted that a restriction imposed by state

law on the right to bestow or receive testamentary gifts, *based on race or color,* would violate the Fourteenth Amendment." (Emphasis ours.)

There is no question of race discrimination involved in Section 27 of the Probate Code of the State of California.

Appellant refers to international relations—*a treaty*—as being involved in *Clark v. Allen,* 331 U.S. 503. This case strongly sustains the position of appellee Joe Burnison to the effect that the devolution of property by will is a matter within the control of the Legislatures of the several States.

We respectfully submit that appellant misapprehendss the effect of *Snyder v. Bettman,* 190 U.S. 249. In support of our contention we quote from the opinion in that case as follows (190 U.S. 250, 251, 252):

> *"This case involves the single question whether it is within the power of the Federal government,* and within the spirit of the act of Congress of June 13, 1898, 30 Stat. 448, as amended March 2, 1901, 31 Stat. 946, *to impose a succession tax upon a bequest to a municipal corporation of a State* for a corporate and public purpose * * *.
>
> "* * * if it be true that the right to impose such taxes arises solely from the right to regulate successions, then a denial of such right goes to the whole power of the government to impose a succession tax, irrespective of the question whether the legacy is made to a private individual or to an agent of the State, and the cases in this court upholding the power of the Federal government to lay such tax were wrongly decided.

"That question was exhaustively considered by this court in Knowlton v. Moore, 178 U.S. 41 * * *.

"* * * This case must be regarded as definitely establishing the doctrine that the power to tax inheritance does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. *It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that under our Constitution the devolution of property is determined by the laws of the several States.*" (Emphasis ours.)

Oyama v. California, 332 U.S. 633, involved a *gift* from an alien Japanese to his son, not a testamentary disposition of property.

Shelly v. Kramer, 334 U.S. 1, involved race discrimination.

As stated above, there is no question as to the power of the United States to receive voluntary bequests. *The question here is as to the power of the Legislatures of the several States to control the devolution of property by will.* The decisions of this Honorable Court are to the effect that *the state law determines what persons are qualified to inherit property within the jurisdiction.*

Appellant relies upon *Dickson v. United States*, 125 Mass 311. In that case, the Court states:

"The decision in United States v. Fox, 94 U. S. 315, affirming S. C. 52 N. Y. 530, by which it was held that a devise by a citizen of New York of real estate in New York to the government of the United States was void, proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state. That decision has no application to this case. *The statutes of this Commonwealth where the testator had his domicile, and part of his real estate lay, make no restriction as to who may be devisees or legatees; and there is no evidence before us that any such restriction is made by the laws of Iowa, where the rest of the real estate is situated.* Gen. Sts. c 92, §§ 1, 2. Jackson v. Phillips, 14 Allen, 539, 552, 589, 591. Fellows v. Miner, 119 Mass. 541. Lorings v. Marsh, 6 Wall. 337, 355. Ould v. Washington Hospital, 95 U. S. 303." (Emphasis ours.)

POINT II.

THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF CALIFORNIA CONSTRUING SECTION 27 OF THE PROBATE CODE OF THE STATE OF CALIFORNIA IS NOT SUBJECT TO REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

As stated by this Honorable Court in the case of *Aero Transit Mayflower Co. v. Board of Railroad Commissioners*, 332 U. S. 495 at 499, 68 S. Ct. 167:

> *"The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes, by the state courts."* (Citing authorities.) (Emphasis ours.)

The appellant recognizes this principle of law, but in the same breath denies it, stating in its brief, page 13, as follows:

> "*The decision below as to the proper construction of Section 27 is, of course, final here,* and the United States does not now raise, any question in regard thereto. The United States does, however, claim that Section 27 as so construed, is unconstitutional as applied to it." (Emphasis ours.)

Here the appellant again relies upon Article VI of the Constitution and ignores the provisions of Amendment X.

In this proceeding we are dealing strictly with a *state matter,* to-wit, the power of the several States to determine what persons are qualified to inherit property within the jurisdiction. (See authorities cited above.)

Appellee Joe Burnison contends that the decision of the Honorable Supreme Court of the State of California construing said section 27 of the Probate Code is not subject to review by this Honorable Court.

We quote from the opinion of this Honorable Court in the case of *Quong Ham Wah Co. v. Industrial Accident Commission of the State of California,* 255 U.S. 445, 41 S. Ct. 373, 65 L. ed. 723, at 725, as follows:

> "But it is elementary that this court is without authority to review and revise the construction affixed to a state statute *as to a state matter* by the court of last resort of the state. (Citing numerous authorities.) *It is hence obvious that*

> *the proposition upon which alone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivolous,* and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it. (Citing numerous authorities.)" (Emphasis ours.)

Further, we quote from *Consolidated Turnpike Co. v. Norfolk, Etc., Railway,* 228 U.S. 596, at 599, 33 S. Ct. 605, 57 L. ed. 982 where this Honorable Court says that, assuming that a Federal question was involved,

> "* * * if also it appears that the judgment of the state court against the plaintiff in error was based upon a question of general law broad enough to support the decision, *this court will not consider the Federal question, though it was considered and determined by the court adversely to the plaintiff in error.*" (Emphasis ours.)

In this proceeding there is involved solely and purely a state matter. *The decision of the Supreme Court of the State of California is based upon a question of general law broad enough to sustain it.* This Honorable Court should sustain said decision, and dismiss appellant's petition.

CONCLUSION.

For the foregoing reasons, and in view of the authorities cited above, it is respectfully submitted that appellant's Petition for Appeal on file herein should

be dismissed, or the judgment of the Supreme Court of the State of California should be affirmed.

Dated, December 2, 1949.

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